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 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,	) No. CR 10-00351-ODW
	)
14 Plaintiff,	) GOVERNMENT'S MOTION TO COMPEL
	) DEFENDANTS TO PERMIT PHOTOGRAPHING
15 v.	) OF TATTOOS
	)
16 ARMANDO BARAJAS, et al.,	) Hearing Date: October 17, 2012
	) Time: 10:00 a.m.
17 Defendants.	) Ctrm: Hon. Otis D. Wright
	)
18 _____	)

19 Plaintiff United States of America, by and through its  
 20 attorney of record, the United States Attorney's Office for the  
 21 Central District of California, hereby moves for an order  
 22 compelling the defendants who remain pending trial in this matter  
 23 (except for defendant Salvador Martinez) to permit photographs to  
 24 be taken of any and all tattoos located on their bodies, subject  
 25 to the proposed conditions outlined below.

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1        This motion is based on the attached memorandum of points  
2 and authorities, the files and records of this case, and any  
3 further evidence as the Court may wish to consider.

4 Dated: September 19, 2012

5                                Respectfully submitted,

6                                ANDRÉ BIROTTE JR.  
7                                United States Attorney

8                                ROBERT E. DUGDALE  
9                                Assistant United States Attorney  
                                 Chief, Criminal Division

10                                /s/  
11                                Michael Dore  
12                                Assistant United States Attorney

**I****INTRODUCTION**

The United States respectfully moves for an order requiring all defendants who remain pending trial in this matter (except defendant Salvador Martinez (#45)) to permit government agents to photograph any and all of each respective defendant's tattoos. As of the date of this motion, those defendants are: Armando Barajas (#1), Juan Gil (#2), Carlos Rivera (#7), Juan Diaz (#9), Maria Lopez (#26), Jessica Medina (#27), Raul Prieto (#29), and Steven Vega (#32) (collectively, "defendants").

As set forth below, the compelled exhibition of tattoos is non-testimonial and, therefore, defendants have no right to refuse to permit photographs of their tattoos. Even if considered testimonial, any decision by defendants to get new tattoos was voluntary and the government's cataloguing of those tattoos would not encroach on defendants' constitutional rights. Because any photographs of defendant's tattoos would have been taken more than two years ago, the government requests an order that would enable the documentation of any additional tattoos that defendants may have acquired in the interim.

**II****FACTS**

Defendants have been charged with violating 18 U.S.C. § 1962(d) (Racketeer Influenced and Corrupt Organizations ("RICO") Conspiracy), among other alleged crimes.<sup>1</sup> Defendants

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<sup>1</sup> Defendant Martinez, whom the government does not seek to photograph, is charged with violating 21 U.S.C. § 846 (Conspiracy to Distribute and to Possess With Intent to Distribute

1 are charged with either participating in the "Black Angels" gang,  
2 or conspiring with members of the Black Angels to commit assorted  
3 crimes.

4 Law enforcement records, observations by law enforcement  
5 personnel, and photographs indicate that some defendants have  
6 tattoos evidencing their membership in, or association with, the  
7 Black Angels gang. At trial, the government intends to introduce  
8 photographs of defendants' tattoos together with other evidence  
9 and testimony to show, among other things, the existence of the  
10 Black Angels gang as a racketeering enterprise and an association  
11 in fact, under 18 U.S.C. § 1961 et seq., and that defendants are  
12 members or associates of the Black Angels gang.

13 The indictment alleges that one characteristic of Black  
14 Angels gang membership is the display of gang tattoos. (CR ¶ 7.)  
15 Because defendants generally were arrested over two years ago,  
16 some or all of them may have gotten tattoos in the interim.  
17 Accordingly, the government seeks an order that requires each  
18 defendant to make himself or herself available to have any and  
19 all tattoos photographed for possible use at trial.

### 20 III

#### 21 ARGUMENT

##### 22 A. Photographing Defendant's Tattoos Is Constitutionally 23 Permissible

24 Defendants have no constitutional right to refuse to permit  
25 photographs to be taken of their tattoos. The Fifth Amendment  
26 privilege against self-incrimination only protects an accused  
27 "from being compelled to testify against himself or otherwise to

28 \_\_\_\_\_  
Methamphetamine and Heroin).

1 provide . . . evidence of a testimonial or communicative nature."  
2 Schmerber v. California, 384 U.S. 757, 761 (1966). The compelled  
3 display of "identifiable physical characteristics," however, is  
4 not testimonial or communicative in nature, and therefore does  
5 not infringe the privilege against self-incrimination. United  
6 States v. Dionisio, 410 U.S. 1, 5-6 (1973).

7 As the Supreme Court has explained:

8 Both federal and state courts have usually held that  
9 [the Fifth Amendment] offers no protection against  
10 compulsion to submit to fingerprinting, photographing,  
11 or measurements, to write or speak for identification,  
12 to appear in court, to stand, to assume a stance, to  
13 walk, or to make a particular gesture.

14 Schmerber, 384 U.S. at 764 (emphases added); see also Gilbert v.  
15 California, 388 U.S. 263, 266-67 (1967) ("The privilege [against  
16 self incrimination] reaches only compulsion of an accused's  
17 communications, whatever form they might take. . . and not  
18 compulsion of real or physical evidence. . . . A mere  
19 handwriting exemplar, in contrast to the content of what is  
20 written, like the voice or body itself, is an identifying  
21 characteristic outside [the Fifth Amendment's] protection.")  
22 (emphasis added; internal quotation marks and citations omitted).

23 As Justice Holmes explained in Holt v. United States, 218  
24 U.S. 245 (1910), "the prohibition of compelling a man in a  
25 criminal court to be witness against himself is a prohibition of  
26 the use of physical or moral compulsion to extort communications  
27 from him, not an exclusion of his body when it may be material."  
28 Id. at 252-53. Thus, courts have routinely compelled an accused  
to provide fingerprints, blood samples, voice exemplars,  
handwriting samples, to stand in a line-up, to wear particular

1 clothing, and to submit to photographs. See, e.g., Dionisio  
2 (voice exemplars); Gilbert (handwriting exemplars); Schmerber  
3 (blood samples).

4 With respect to tattoos, the Ninth Circuit has held that it  
5 was error to prohibit a defendant from displaying his hands and  
6 their distinctive tattoos to the jury without subjecting himself  
7 to cross-examination precisely because the display of tattoos is  
8 non-testimonial and the government could compel it:

9 [A] display of hands is non-testimonial. This has been  
10 repeatedly held in cases in which the government seeks  
11 to compel a defendant to show various types of physical  
12 characteristics to the jury. The cases hold that this  
13 does not infringe the Fifth Amendment privilege against  
14 self-incrimination.

15 United States v. Bay, 762 F.2d 1314, 1315 (9th Cir. 1984) (citing  
16 Dionisio, Schmerber, Holt, and United States v. Valenzuela, 722  
17 F.2d 1431, 1433 (9th Cir. 1983)); see also Mercado v. Crawford,  
18 2010 U.S. Dist. LEXIS 49563, at \*47 (D. Nev. Apr. 26, 2010)  
19 ("Tattoos are a physical attribute which is not protected as  
20 testimonial."); Chavez v. Compton, 2010 U.S. Dist. LEXIS 4285, at  
21 \*4 (D. Mont. Jan. 20, 2010) ("There is no basis upon which to  
22 bring a Fifth Amendment claim as the display of Chavez's tattoos  
23 were non-testimonial.").

24 Even if considered testimonial, any new tattoos themselves  
25 would not have been compelled by the government. As the Second  
26 Circuit recently held, even if law enforcement could read a  
27 defendant's tattoo "only by applying physical force during his  
28 arrest," it "would still not amount to compulsion for Fifth  
Amendment purposes." United States v. Greer, 631 F.3d 608, 613  
(2d Cir. 2011). Consequently, an order compelling defendants to

1 permit the taking of photographs of their tattoos would not  
2 violate their privilege against self-incrimination.

3 **B. Defendants Were Arrested In This Case Over Two Years**  
4 **Ago, And May Have Gotten New Tattoos Since Then**

5 Many of the defendants have had their tattoos photographed  
6 before, and for several defendants these photographs have  
7 revealed numerous tattoos that appear gang-related. However, the  
8 government seeks additional photography at this point because a  
9 significant period of time has passed since defendants were taken  
10 into custody in this case (in fact, defendant Juan Gil was  
11 already in custody on the day of the April 2010 takedown in this  
12 case, and thus was not arrested and photographed  
13 contemporaneously with other defendants).

14 As indicated in the criminal docket, each remaining  
15 defendant made his or her initial appearance in this case in mid-  
16 2010:

17 DEFENDANT	DATE OF INITIAL APPEARANCE
18 Armando Barajas (#1)	April 21, 2010 (CR 108)
19 Carlos Rivera (#7)	June 2, 2010 (CR 426)
20 Juan Diaz (#9)	July 14, 2010 (CR 610)
21 Maria Lopez (#26)	April 21, 2010 (CR 155)
22 Jessica Medina (#27)	April 21, 2010 (CR 159)
23 Raul Prieto (#29)	June 28, 2010 (CR 553)
Steven Vega (#32)	June 17, 2010 (CR 518)

24 Inmates often are able to get tattoos even while in custody.  
25 See, e.g., Rodriguez v. McDonald, 2012 U.S. Dist. LEXIS 111464,  
26 at \*54-55 (C.D. Cal. Mar. 22, 2012) (finding that person had  
27 "ample opportunity" to obtain a tattoo during period he was in  
28 custody); Rickner v. Hutchinson, 2009 U.S. Dist. LEXIS 128820, at

1 \*24 (E.D. Mich. Oct. 9, 2009) ("[Plaintiff] reported receiving  
2 prison tattoos during his incarceration."). Defendants Prieto,  
3 Medina, and Lopez, who are out of custody on bond, have had even  
4 more opportunity over the past 2+ years to get tattoos related to  
5 the criminal enterprise alleged in the indictment.<sup>2</sup>

6 Indeed, in arguing that he should be released on bond in  
7 August 2010, defendant Prieto claimed that he "has none of the  
8 gang tattoos worn by members of the Black Angels - or their  
9 affiliated groups," and thus he was not a Black Angels member and  
10 his role in the case was "very small." (Def. Prieto's Mem. in  
11 Support of Request for Release on Bond (Aug. 30, 2010) (CR 684)  
12 at 5.) However, in or around March 2011, defendant Prieto  
13 apparently admitted at the San Bernardino Sheriff's Department  
14 Central Detention Center to being a member of the OVS gang, a  
15 "sub-clique" of the Black Angels. (Indictment (CR 1) at 2.)  
16 The government believes it is necessary and appropriate to  
17 determine whether since being arrested in this case more than two  
18 years ago defendant Prieto and/or any of the other defendants  
19 have decided to use tattoos to identity themselves with the  
20 alleged Black Angels gang enterprise, or the aligned Mexican  
21 Mafia organization. Such tattooing would show, among other  
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23 <sup>2</sup> The conditions of release for defendants Prieto, Medina,  
24 and Lopez already contemplate that each of them "will agree to  
25 submit to a search of [his or her] person and/or property by  
26 Pretrial Services in conjunction with the U.S. Marshal" to  
27 determine compliance with conditions regarding possession of  
28 weapons or illegal drugs. (See CR 1022 (Prieto); CR 1286  
(Lopez); CR 247-1 (Medina).) Moreover, on July 11, 2012, United  
States Pretrial Services petitioned the Court for action on  
defendant Medina's conditions of pretrial release, noting that  
she had tested positive for methamphetamine and had police  
contacts with alleged gang members. (CR 1580.)



1 things, the commitment a given defendant has to the alleged  
2 enterprise and the existence of the enterprise itself.

3 The government does not oppose taking various steps to  
4 minimize any claimed burden on defendants. Thus, the government  
5 is seeking a current photographic inventory of defendants'  
6 tattoos rather than any physical display of them at trial. See  
7 *Cao v. Taylor*, 2010 U.S. Dist. LEXIS 139928, at \*31-32 (C.D. Cal.  
8 Nov. 2, 2010) (rejecting habeas petition arising from California  
9 state criminal trial in which defendant was ordered to "take off  
10 his shirt in front of the jury to show his tattoos"). Moreover,  
11 (subject to BOP discretion for those in custody) the government  
12 does not oppose having any photographing take place in a private  
13 setting, with defendants' respective lawyers permitted to be  
14 present, a law enforcement officer of the same gender as a given  
15 defendant taking the photographs, and a limitation that the  
16 photographs be limited to areas of the body visible if defendant  
17 were wearing a bathing suit (i.e., bikini or reasonably sized  
18 swim trunks).

19 For all defendants, and particularly those defendants who  
20 are not in custody (that is, defendants Prieto, Lopez, and  
21 Medina), the government further requests that if the Court grants  
22 the government's motion that it permit the photography of areas  
23 of defendant's bodies covered up by any bandage or wrapping, or  
24 irritated areas of the skin that appear in the photographer's  
25 judgment to have recently had a tattoo removed.

IV

CONCLUSION

For the forgoing reasons, defendants should be ordered to permit government agents to take photographs of all tattoos on the defendants' bodies subject to the conditions outlined above.

Dated: September 19, 2012

Respectfully submitted,  
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